

89-300

Supreme Court, U.S.

FILED

JUL 22 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

WILLIAM GEORGE,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT**

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Brescia's Printing Services, Inc.
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QUESTION PRESENTED

1. Are the defendant's rights of confrontation and due process, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, violated when during the course of an evidentiary hearing, based upon defendant's motion to suppress and motion to dismiss pursuant to *Franks v. Delaware*,¹ the defendant's *chief accuser* refuses to testify and when the court then refuses to admit documentary evidence pertinent to that witness' prior statements after that witness refuses to testify at the evidentiary hearing?

¹ 438 U.S. 154 (1978).

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**PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, William George, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Connecticut entered in this proceeding on March 7, 1989 and to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on May 18, 1989.

CITATION

A decision of the Connecticut Supreme Court, *State v. William George* (a copy of which is annexed hereto), denying defendant's Petition for Certiorari after a decision of the Connecticut Appellate Court, *State v. William George*, 17 Conn. App. 587, ____ A.2d ____ (1989) (a copy of which is annexed hereto).

JURISDICTIONAL GROUNDS

On March 7, 1989, the Connecticut Appellate Court entered judgment affirming the conviction of William George on three counts of professional gambling in violation of Connecticut General Statute § 52-278(b), three counts of using a telephone to transmit or receive gambling information in violation of Connecticut General Statute § 53-278(a) and one count of persistent offender in violation of Connecticut General Statute § 53-278(f). Thereafter on March 17, 1989, in accordance with Connecticut Practice Book Sections 2013, 4121 *et seq.* a Motion for Re-Argument was filed, which motion was denied on April 6, 1989. Thereafter on April 26, 1989 in accordance with Connecticut Practice Book § 4126 *et seq.* a Petition for Certification by the Connecticut Supreme Court was filed which Petition was denied on May 18, 1989.

The jurisdiction of this Court is invoked under the authority of 28 U.S.C.A. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The defendant relies upon the following provisions of the United States Constitution with respect to Questions Presented:

- 5th Amendment (attached in Appendix)
- 6th Amendment (attached in Appendix)
- 14th Amendment (attached in Appendix).

STATEMENT OF THE CASE

On May 2, 1985, the defendant, William George, was arrested and charged by information with three counts of professional gambling in violation of Section 53-278(b) of the Connecticut General Statutes, and three counts of using a telephone to transmit or receive gambling information in violation of Section 53-278(a) of the Connecticut General Statutes. Following the filing of Part II of the information on May 22, 1985, Mr. Speers was also charged with being a persistent offender in violation of Section 53-278(f) of the Connecticut General Statutes.

His arrest on these charges was based upon information gathered by State Agents through the use of a wiretap on the telephone of the co-defendant's residence. Said wiretap was obtained pursuant to Connecticut General Statutes § 54-41 *et seq.*

The approval of the Wire Tap Panel was based on the March 15, 1985 Wire Tap Application of State's Attorney for the Judicial District of Waterbury (Application for Order to Intercept Wire Communications No. 85-02). Said Application was supported by the affidavits of Sergeant Ronald Kamens of the Connecticut State Police, dated March 14, 1985, and Lieutenant Thomas R. Brown of the Waterbury Police Department, dated March 12, 1985.

On March 4, 1985 at a meeting between State's Attorney John Connelly, Lieutenant Bruce Haines of the Connecticut State Police and Lieutenant Thomas R. Brown of the Waterbury Police Department, it was agreed that Lieutenant Brown's affidavit would have primary responsibility for showing probable cause that said crimes were being committed in order to justify the Wire Tap Panel's approval of the requested wiretap. Lieutenant Brown elected to carry out that responsibility by declaring in his affidavit that his confidential informant's information was reliable because

said informant had provided reliable information in the past which led to two arrests and convictions.

The defendant filed a Motion to Suppress the Contents of and Fruits of Intercepted Wire Communications and Pen Register Records resulting from Wiretap Application Number 85-02, Order Number 85-02, 261 Tbdd Road, Wolcott, Connecticut dated January 27, 1986, challenging the facial validity of an affidavit in support of an application to obtain a wiretap on his telephone. The motion contains several grounds for relief. The one which formed a major issue of his appeal is the claim that the affidavit of the affiant, Lieutenant Thomas R. Brown, contained intentional falsehoods which were deliberate and material or which were made with a reckless disregard for the truth. There were also significant omissions which misled the Wiretap Panel to approve the application in violation of the standards enunciated in *Franks v. Delaware*, 438 U.S. 154 (1978). This motion was supported by a Memorandum in Support of the Motion to Suppress the Contents of and Fruits of Intercepted Wire Communications and Pen Register Records Resulting from Wiretap Application 85-02, Order 85-02 (Speers) pursuant to *Franks v. Delaware, supra*, dated March 4, 1986.

On July 21, 1987, after a series of memoranda in support of and in opposition to Motions to Suppress and Dismiss and additional Motions for Exculpatory Information which included transcripts of grand jury testimony involving an investigation which resulted in the arrest of Lieutenant Brown for Perjury and Evidence Fabrication pertaining to the affidavit at issue in the instant case, Judge Joseph Flynn ruled that the defendants had made the requisite preliminary showing pursuant to *Franks* and granted an evidentiary hearing.

The defendant filed a Motion to Dismiss, dated March 18, 1987, requesting dismissal of all charges based on Connecticut Constitution Article 1, §§ 7, 8 and 9, and United States Constitution, Amendment IV and XIV, *Franks v.*

Delaware, 438 U.S. 154 (1978), and the *Aguilar-Spinelli* test and a Memorandum in Support of Defendant's Motion to Dismiss dated March 17, 1987.

An evidentiary hearing was held before Judge Flynn pursuant to the rule enunciated in *Franks v. Delaware*, *supra*, from July 21, 1987 through July 27, 1987.

The defendant claimed the following in support of his assertion of false statements regarding material facts in the affidavit by the affiant Lieutenant Thomas R. Brown.

1. The allegedly reliable information was "Gus" Fennessy;

2. The informant had not provided reliable information in the past leading to two arrests and convictions as sworn to by affiant Brown;

3. The *Franks* standard has been applied not only to affirmative statements, but to omissions of material fact as well. (See *U.S. v. Ferguson*, 758 F.2d 843 (2nd Cir. 1985); *U.S. v. Williams*, 737 F.2d 594 (7th Cir. 1984).

During the course of the evidentiary hearing, the defendant who had been arrested as a result of a sworn statement of Lieutenant Thomas R. Brown which led to the wiretap of the defendant's telephone, called Lieutenant Brown as a witness at the *Franks* hearing. Prior to the *Franks* hearing, Lieutenant Brown had been arrested after a One Man Grand Jury inquiry, for two counts of Perjury and one count of Evidence Fabrication. His arrest was based on the allegation that he lied when he swore in his affidavit in support of the wiretap application for Speers' telephone, that his reliable informant had provided information in the past that led to two arrests and convictions.

When called as a witness by the defendant, Lieutenant Brown did not personally appear. He was instead represented

by legal counsel who invoked Lieutenant Brown's Fifth Amendment privilege.

The defendant then offered the contents of the case file of *State v. Thomas R. Brown*. The trial court refused to admit this documentary evidence.

On July 31, 1987, Judge Flynn filed his written Memorandum of Decision on Defendant's Motions to Suppress and Dismiss dated July 28, 1987 denying the Motions on the grounds that the defendant failed to show by the required proof that the wiretap affidavit of Lieutenant Thomas R. Brown contained material falsehoods substantially affecting the basis for a finding of probable cause that that had been deliberate or recklessly made.

Thereafter on August 7, 1987, the defendant entered a conditional plea of *nolo contendere* pursuant to Connecticut General Statute § 54-94(a) to all charges, reserving his right to appeal the court's decision of his motion to suppress.

Mr. George was sentenced by Judge Lavery on September 4, 1987 to four years incarceration, suspended after nine months with four years probation and \$5,000 in fines. An appeal from the trial court's decision was filed in the Connecticut Appellate Court on September 16, 1987.

On appeal, the defendant assigned as error:

1. The Trial Court's denial of his Motion to Suppress and Memorandum to Dismiss citing numerous factual incongruities between the testimony presented and the court's reasoning in its memorandum decision;
2. The Trial Court's exclusion of the case file of *State v. Thomas Brown*, and
3. The Trial Court's decision denying the suppression of the evidence and dismissal of the charges when the defendant's chief accuser refused to testify.

The Appellate Court held with regard to the first issue, that the Trial Court's determinations were correct.

The Appellate Court found no merit to the defendant's claims with regard to issues two and three.

On March 7, 1989, the Connecticut Appellate Court issued its decision affirming the Trial Court, *State v. George*, 17 Conn. App. 587 ____ A.2d ____ (1989).

On March 17, 1989, the defendant filed a Motion for Re-argument En Banc in the Connecticut Appellate Court. Said motion was denied on April 6, 1989.

On April 26, 1989, the defendant timely filed a Petition for Certification by the Supreme Court in the Connecticut Supreme Court. Said Petition was denied on May 19, 1989.

Thereafter on May 22, 1989, the defendant filed a Motion for Stay of Execution in the Connecticut Appellate Court citing the defendant's intention of filing this Petition for Certiorari. The defendant was granted a stay of execution by the Connecticut Appellate Court on June 27, 1989.

ARGUMENT OF LAW

1. Are The Defendant's Rights Of Confrontation And Due Process, As Guaranteed By The Fifth, Sixth And Fourteenth Amendments To The United States Constitution, Violated When During The Course Of An Evidentiary Hearing, Based Upon Defendant's Motion To Suppress And Motion To Dismiss Pursuant To *Franks v. Delaware*, The Defendant's *Chief Accuser Refuses To Testify*; And When The Court Then Refuses To Admit Documentary Evidence Pertinent To That Witness's Prior Statements After That Witness Refuses To Testify At The Evidentiary Hearing?

The right to effective cross-examination is a constitutional right protected by the Sixth Amendment's guarantee that every criminal defendant have an opportunity to confront the witnesses against him. *Douglas v. Alabama*, 360 U.S. 415 (1965). This constitutional right embraces a coordinate right to have an opportunity to explore freely the witnesses' motives and intent *Davis v. Alaska*, 415 U.S. 308 (1974).

The United States Supreme Court also recognized in *U.S. v. Nixon*, 418 U.S. 683 (1974) that our system of justice requires opportunity for full disclosure and presentation of all facts stating:

"We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded in a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Id.* at 708-709.

In the instant case the defendant was placed in the untenable position of having been arrested as a result of Lieutenant Thomas Brown's sworn statement and then being rendered incapable of confronting and cross-examining his accuser because of his accuser's assertion that his testimony would incriminate him. In order for the court to have a full appreciation of the fragile and unreliable nature of Lieutenant Brown's sworn statement, the entire case file pertaining to his arrest was offered by the defendant. Included in the offer was information regarding Lieutenant Brown's arrest, the 70-page arrest warrant affidavit of Inspector Frank D'Amico of the Chief State's Attorney's office which included segments of the Grand Jury testimony of Lieutenant Thomas Brown, statements of Robert Fennessy (the alleged informant), David Linsky, Lieutenant Bruce Haines, Detective Ronald Kamens, and others, as well as Lieutenant Brown's Grand Jury testimony.

It was as a result of this Grand Jury inquiry that Lieutenant Brown had been arrested on December 16, 1986, as aforementioned. Again, it was this arrest which placed the State in the anomalous position of prosecuting its affiant Lieutenant Thomas Brown for lying in his sworn statement, while simultaneously crediting his same sworn statement in the prosecution of the defendant.

Under these peculiar and unique circumstances, the court should have admitted the documentary evidence enumerated above because Lieutenant Brown refused to testify. The evidence should have been admitted with the provision that the court would give the evidence the weight it deserved, if any, in light of all other testimony elicited.

It is the defendant's chief contention, however, that his inability to cross-examine his chief accuser should have terminated the prosecution against him and mandated a dismissal of all charges. At stake were defendant's Fifth, Sixth and Fourteenth Amendment guarantees under the United States Constitution.

One example of the sort of cross examination which could have been conducted on Lieutenant Brown dramatically demonstrates the manner in which the defendant was deprived of his right to confrontation and a meaningful hearing after having made "the requisite preliminary showing." It reveals the Kafkaesque proportions of the defendant's dilemma.

Brown submitted his first affidavit in support of his application for a wiretap on the defendant's telephone in January of 1985. This application did not state that his informant had given him information in the past which led to arrests and conviction. Another affidavit and application was submitted by Brown on March 15, 1985 (Application for Order to Intercept Wire Communication Number 85-02).

Brown's March affidavit miraculously provided his informant with reliability which *coincidentally* matched the requirements of *Aguilar-Spinelli*.¹

Lieutenant Brown was asked by Prosecutor David Shepach before Grand Jury Number 85-01 to provide the files which supported his claim of prior arrests and convictions attributable to his informer. The files produced revealed one arrest and no convictions in *State v. Rizzutti* and an arrest and conviction in *State v. Maldonado*, which conviction occurred in April 1985 (one month after Brown signed the affidavit under scrutiny). Of course, Brown, with these facts and others in prosecutorial hands, was arrested for Perjury and Evidence Fabrication.

¹ Article One § 7 of the Connecticut Constitution "affords more substantive protection to citizens than does the Fourth Amendment to the Federal Constitution in the determination of probable cause" *State v. Morrill*, 205 Conn. 560, 534 A.2d 1165, 1169 (1987) citing *State v. Kimbra*, 197 Conn. 219, 496 A.2d 498 (1985). This concern by the State of Connecticut to provide an even greater protection to its citizens is evidenced by Connecticut's rejection of the "totality of the circumstances" test of *Illinois v. Gates*, 462 U.S. 213 (1983) and its adherence to the more rigid *Aguilar-Spinelli* analysis when testing the contents of an affidavit supporting an application for a search warrant or a wiretap order. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. U.S.*, 393 U.S. 410 (1969).

The machination outlined above, while a dramatic revelation, is only emblematic of the fruitful yield which could have been expected if the defendant was able to confront his accuser.

It is institutionally unacceptable and contrary to public policy to allow an affiant police officer to rely on his Fifth Amendment right not to testify in a hearing to suppress evidence and dismiss criminal charges which were brought because that same police officer provided sworn testimony as to certain criminal activity allegedly being carried out by the defendant on trial. Not to dismiss the charges creates a preposterous situation where the appearance and reality of unfairness meld into one. The court had the ability under its general supervisory power over the administration of justice to dismiss the charges against the defendant. In light of the facts and circumstances of the case it was error for the trial court not to elect to exercise its "inherent supervisory authority over the administration of justice," *United States v. Butler*, 566 F.2d 885, 893 (9th Cir. 1978).

The court was not presented with a situation where highly significant competing social interests outweigh the important judicial consideration of the public perception of our justice system, as well as the defendant's right to a hearing ordered by the court and his right to confront his police/officer-accuser. The sound administration of justice and the integrity of the tribunal itself was at stake.

Nothing is more fundamental to our justice system than the right of an accused in a criminal trial to due process. Due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend

against the state's accusation. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, *supra*. Mr. Justice Black, writing for the Court in *In re Oliver*, 333 U.S. 257, 273 (1948), identified these rights as among the minimum essentials of a fair trial:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

See also *Morrissey v. Brewer*, 408 U.S. 471, 488-489 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 428-429 (1969); *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

The defendant's right to cross-examine and right to offer testimony are both implicated in the present case.

The defendant was denied an opportunity to cross-examine the affiant upon whom his arrest and the State's case were based. He was not allowed to test affiant Brown's veracity, or sift his conscience so that the judge might determine whether his information was worthy of belief. *Mattox v. U.S.*, 156 U.S. 237 (1895).

"The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation and helps assure the 'accuracy of the truth determining process' ". *Chambers*, *supra* at 295 quoting *Dutton v. Evans*, 400 U.S. 784, 89 (1970).

Cross-examination is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400 (1965).

All evidentiary rulings excluding critical testimony inhibit the defendant's right to defend, even if the ruling is technically in accord with the accepted rules of evidence. There can be no gainsaying the absolute and sacrosanct right of Lieutenant Brown to rely upon the Fifth Amendment. But the State cannot have it both ways. It cannot affirm his rights and simultaneously denigrate those of the defendant.

"Few rights are more fundamental than those of an accused to present witnesses in his own defense. . . . In the exercise of this right, the accused, as is required of the State, must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers, supra*, at 302.

Of course, the right to confront and to cross-examine is not absolute and may in appropriate cases bow to accommodate other legitimate interests in the criminal trial process. However, its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined. *Id.* at 284.

In this case, the trial court was aware of Lieutenant Brown's pivotal role in the defendant's prosecution. He was not a fringe participant but was rather the central figure who initiated the arrest and upon whose word the entire defense succeeded or failed. His testimony was not merely cumulative. The court in its own motion could have continued the case in order to obtain Brown's unique and significant testimony. However, Judge Flynn through his conduct and frequent remarks made clear that the hearing was not to be delayed or impeded in any way.

Of course the court had the alternative of dismissing the charges but chose not to exercise that prerogative and consequently deprived the defendant of his right to confront his chief accuser. As a result the defendant was denied both due process and a fair trial.

The trial court in the instant case was presented with this dilemma. The most crucial witness for the defendant was unavailable through no fault of the defendant. A continuance of the matter was not feasible because of the judge's proclaimed intent to avoid further delay. The court was presented with a stalemate. However unsatisfactory a stalemate may be to the combatants, it must not result in violations of defendant's fundamental constitutional protections and guarantees.

In *Davis v. Alaska*, 415 U.S. 308 (1974), a lower court's protection order preventing impeachment of the juvenile by revealing the juvenile adjudication was ruled to be a denial of the right of confrontation. The court's language is applicable to the case at hand. "A non-particular attack on the witness's creditability is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they relate directly to the issues or personalities in the case at hand. . . .". *Id.*

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted their line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided a crucial link in the proof . . . of petitioner's act." *Id.* at 314.

Here, the trial judge should have had the benefit of Brown's testimony so he could have made an informed judgment on the defendants' claims not only of Brown's lies but of his bias, prejudice and ulterior motives.

The defendant also has the right, under *Franks v. Delaware*, *supra*, to examine and expose material misstatements or omissions in warrant affidavits. A defendant cannot

exercise this right without access to the affiant whose sworn statements are the subject of the *Franks* hearing and upon whom the prosecution based its case.

Judge Flynn on July 21, 1987, ruled that the defendant had fulfilled his obligation in that he had made the requisite preliminary showing pursuant to *Franks v. Delaware, supra*, and was therefore entitled to an evidentiary hearing. This decision was based on an abundance of evidence. *Franks v. Delaware, supra*, allows for an evidentiary hearing when the defendant makes "a substantial preliminary showing that a false statement knowingly and intentionally . . . was included by the affiant" and that such false statement was necessary to the finding of probable cause.

"To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Id.* at 171.

Judge Flynn concluded from evidence presented by the defendant that a hearing was mandated and that the defendant's right to the hearing was supported by more than a mere desire to cross-examine.

The *Franks* hearing was for the purpose of meaningful, thorough and effective cross-examination of material witnesses. For the court to conclude that the defendant has made the requisite preliminary showing is tantamount to the court concluding that the defendant has an absolute right to cross-examine his main accuser and the architect of his arrest. The inherent contradiction in the instant fact pattern is that the court granted the hearing for good, sufficient and lawful cause in accord with *Franks* and then the defendant was precluded from having this hearing. If the defendant did not make "the substantial preliminary showing," he would have no right to a hearing and to cross-examine. Having once crossed that threshold, the defendant cannot be denied the hearing which

he has been given by court decree by not having the absolute right to cross-examine his main antagonist.

The court's conclusion of a requisite preliminary showing is, in other words, a giant step. At that point the mechanism is triggered for a hearing. Indeed a hearing is mandated by law. If, through no fault of his, a hearing cannot be had because witnesses are unavailable, the defendant must not be punished by doing without a hearing.

CONCLUSION

The Trial Court was compelled by law and oath of office to provide a fair *Franks* hearing. A *Franks* hearing must be accorded the full measure of fundamental procedural due process protections which are routinely recognized at the formal trial stage.

The defendant was deprived of his fundamental rights by the Court's ruling while the fact-finding and truth-seeking mission of the *Franks* hearing was aborted.

The ultimate result of the foregoing facts was that the defendant was granted a *Franks* hearing in name only. He was deprived of confronting and cross-examining the police officer affiant who had obtained a wiretap of his telephone by swearing under oath that "Gus" Fennessey was his "tried and true" "confidential" informant. A wiretap panel would not have authorized the tap of the defendant's phone without the assertion regarding the informer's tested reliability. Therefore Brown's testimony was crucial.

Since the defendant was denied direct access to Lieutenant Brown he made the offer of Brown's case file. The Court was authorized to take judicial notice of that file and erred when it refused to do so. The Connecticut Supreme Court in *State v. Lenihan*, 151 Conn. 552, 200 A.2d 476 (1964) stated: "There is no question concerning the trial court's power to take judicial notice of a file in a proper case . . . we may also take judicial notice of files of the Superior Court in the same or other cases." *Id.* at 478. (See also *Guerriero v. Galasso*, 144 Conn. 600, 136 A.2d 497 (1957)).

The Court in granting the *Franks* hearing recognized the extraordinary circumstances of Lieutenant Brown's arrest. That same Court was duty-bound to recognize the extraordinary circumstances the defendant was placed in when he was denied his opportunity to challenge Lieutenant Brown at the *Franks* hearing.

The defendant's *Franks* hearing was not conducted in a manner consistent with traditional notions of due process and was therefore not in accord with fundamental fairness guaranteed by the United States Constitution.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate and Supreme Courts of State of Connecticut.

PETITIONER,

WILLIAM GEORGE

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APPENDIX

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STATE OF CONNECTICUT v. THOMAS SPEERS
(6385)

STATE OF CONNECTICUT v. WILLIAM GEORGE
(6738)

DUPONT, C. J., STOUGHTON and NORCOTT, Js.

Convicted, following conditional pleas of nolo contendere, of the crimes of gambling, professional gambling and transmitting or receiving gambling information by telephone, the defendants appealed to this court claiming, inter alia, that the trial court erred in denying their motion to suppress certain evidence seized in a wiretap of their telephones. They alleged that a police officer, B, in applying for the warrant, had made false statements and given misleading information and that B had omitted significant facts from the affidavit. The trial court concluded that there was sufficient other information contained in the application to support the approval of the wiretap request. *Held:*

1. The trial court correctly determined that, even absent the allegedly false statements in the affidavit, the affidavit was sufficient to establish probable cause that the defendants were involved in illegal gambling activities.
2. There was no merit to the defendants' claim that the trial court erred in refusing to take judicial notice of the court file pertaining to B's arrest for perjury in connection with the warrant application after B refused, on fifth amendment grounds, to testify at their suppression hearing; that court did offer to allow a transcript of B's testimony into evidence at the hearing and it did not abuse its discretion in determining that the file contained inadmissible hearsay and double hearsay.

Argued November 18, 1988—decision released March 7, 1989

Information charging the defendant in each case with the crimes of professional gambling, gambling and

State v. Speers

transmitting or receiving gambling information, brought to the Superior Court in the judicial district of Waterbury, where the court, *Flynn, J.*, denied the defendants' motions to suppress certain evidence and to dismiss; thereafter, the matters were presented to the court on pleas of *nolo contendere*; judgments of guilty from which the defendants filed separate appeals to this court. *No error.*

Timothy C. Moynahan, with whom, on the brief, were *John M. Loconsolo, Jr.*, and *Theresa M. Dalton*, for the appellant (defendant in the first case).

Frederick D. Paoletti, Jr., with whom, on the brief, were *John M. Loconsolo, Jr.*, *Timothy C. Moynahan* and *Theresa M. Dalton*, for the appellant (defendant in the second case).

James K. Robertson, Jr., special assistant state's attorney, with whom, on the brief, was *John A. Connelly*, state's attorney, for the appellee (state).

NORCOTT, J. The defendants, Thomas W. Speers and William George,¹ appeal from judgments of conviction following their conditional pleas of *nolo contendere*² to the crimes of gambling and professional gambling in violation of General Statutes § 53-278b (a) and (b)³ and

¹ The same criminal investigation led to the arrests of both defendants. Their appeals were argued together and raise the same claims of error.

² General Statutes § 54-94a and Practice Book § 4003 (a) authorize defendants to condition their entry of a plea of *nolo contendere* on the right to take an appeal from the trial court's denial of a motion to suppress evidence based on an unreasonable search or seizure or motion to dismiss. The issue before this court is "limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss." Practice Book § 4003 (a).

³ "[General Statutes] Sec. 53-278b. GAMBLING; PROFESSIONAL GAMBLING; PENALTIES. (a) Any person who engages in gambling, or solicits or induces another to engage in gambling, or is present when another person or persons are engaged in gambling, shall be guilty of a class B misdemeanor; provided natural persons shall be exempt from prosecution and punishment

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transmitting or receiving gambling information by telephone in violation of General Statutes § 53-278d (a).⁴ They claim the trial court erred in denying their motion to suppress evidence obtained through a wiretap investigation, and their motion to dismiss the charges against them, (1) by determining that the defendants did not prove that allegedly false statements and misleading omissions, made by an affiant to obtain approval of a wiretap application, voided the basis for probable cause to issue the arrest warrant, and (2) by refusing to admit into evidence, during a *Franks* hearing,⁵ documents concerning the allegedly false information provided by the warrant application affiant, Lieutenant Thomas R. Brown of the Waterbury police department. They also claim that their inability to cross-examine Brown constitutes a violation of their constitutional right to confrontation. We find no error.

The record reveals the following facts. On March 15, 1985, the state's attorney for the judicial district of Waterbury applied to a panel of judges, by authority of General Statutes § 54-41b, for an order authorizing interception of the telephonic communications of the defendants. The application was accompanied by the supporting affidavits of Connecticut state police Detective Ronald W. Kamens and Brown, alleging that the

under this subsection for any game, wager or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only and in which no person is participating, directly or indirectly, in professional gambling.

"(b) Any person who engages in professional gambling shall be guilty of a class A misdemeanor."

⁴ General Statutes § 53-278d provides in pertinent part: "(a) Any person who knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, or other means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information, shall be guilty of a class A misdemeanor."

⁵ *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

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defendants were engaged in professional gambling. By order dated March 19, 1985, the three judge panel authorized a limited telephonic interception for a period of fifteen days. On the basis of information obtained through the wiretap, the defendants were arrested pursuant to warrants issued on May 2, 1985.

Following the defendants' arrests, Brown was arrested and charged with perjury for allegedly falsely stating in the affidavit in support of the wiretap application that the informant who had supplied him with information about the defendants' illegal activities had previously given him information that had resulted in two arrests and two convictions. The defendants filed a motion to suppress the evidence obtained through the wiretap and a motion to dismiss the charges against them. They claimed that the arrest warrant was invalid because Brown's statement regarding the informant was false and intentionally or recklessly made and because he had omitted significant facts from the affidavit. On July 21, 1987, the trial court granted the defendants' motion for an evidentiary hearing as provided by *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), and *State v. Dolphin*, 195 Conn. 444, 456-57, 488 A.2d 812, cert. denied, 474 U.S. 833, 106 S. Ct. 103, 88 L. Ed. 2d 84 (1985). At the conclusion of the hearing, the court denied the defendants' motions to suppress and dismiss, concluding that the defendants had failed to prove, by a preponderance of the evidence, that Brown's statement was false and was made intentionally or recklessly or that any omissions materially affected the accuracy of the affidavit. The court also concluded that the defendants had failed to prove that the warrant application, even when viewed without the challenged statement by Brown, and considering the alleged omissions, was

insufficient to establish probable cause.⁶ The defendants withdrew their pleas of not guilty, pleaded *nolo contendere*, and appealed the trial court's rulings.

I

The defendants first claim that the trial court erred in determining that they had failed to prove that Brown's statement regarding the informant was false and made intentionally or recklessly, that there were material omissions and that there was insufficient other information to support the approval of the wiretap request.

After the trial court granted the defendants a *Franks* hearing, it became the defendants' burden to establish, by a preponderance of the evidence, either that Brown deliberately falsified information contained in the wiretap affidavit or prepared the affidavit with reckless disregard for the truth, and that any intentionally false statements or material omissions were necessary to a finding of probable cause. See *State v. Telesca*, 199 Conn. 591, 608, 508 A.2d 1367 (1986).

Brown, exercising his privilege against compulsory self-incrimination, refused to testify at the *Franks* hearing. The defendants, in attempting to prove that the statement by Brown was false or recklessly made, prin-

⁶ In their briefs, the defendants argue that the trial court's actions in granting the *Franks* hearing, and then ultimately deciding that Brown's alleged false statement was not necessary for a finding of probable cause, are contradictory. Although it is true that suppression hearings under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), are commonly granted when "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is *necessary to the finding of probable cause*"; (emphasis added) *id.*, 155-56; it is also true that in this case the trial court granted the hearing expressly reserving any determination of whether the challenged statement was false and whether the statement substantially affected the basis for a finding of probable cause.

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cipally depended upon the testimony of the informant, Robert "Gus" Fennessy, from whom Brown had received information about the defendants' gambling. Fennessy testified that, inter alia, he had not served as an informant against others in the past and that no information that he may have passed on to police had ever contributed to arrests and convictions. The court, however, in its memorandum of decision, discredited Fennessy's testimony and, relying upon a number of other factors, elicited through testimony at the hearing, held that the defendants had failed to prove that it was more likely than not that Brown's statement was false and intentionally or recklessly made.

In a suppression hearing, the trial court serves as the trier of fact, and it is axiomatic that "[t]he trier of the facts determines with finality the credibility of witnesses and the weight to be accorded their testimony. 'We cannot retry the facts or pass upon the credibility of the witnesses.'" *State v. Penland*, 174 Conn. 153, 157-58, 384 A.2d 356, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978), [quoting *Johnson v. Flammia*, 169 Conn. 491, 497, 363 A.2d 1048 (1975).]" *State v. Kimbro*, 197 Conn. 219, 222-23, 496 A.2d 498 (1985). Our role as a reviewing court is limited to deciding whether the trial court's decision was clearly erroneous in light of the evidence in the whole record. Practice Book § 4061; *State v. Enright*, 17 Conn. App. 142, 146, 550 A.2d 1095 (1988).

A review of the record and transcript of testimony given by the witnesses called at the *Franks* hearing reveals an adequate basis for the trial court's decision. Detective Kamens, the other affiant in the wiretap application, testified that Brown had told him that Fennessy's testimony had led to two arrests and convictions in the past, and that he believed that Brown's statement was reliable. Lieutenant Bruce Haines of the state police also testified that when he met with Brown

and state's attorney John Connelly at the time of the wiretap investigation, he stated that he did not believe Brown was dishonest. Although the defendants asserted that Brown's motive for intentionally making a false statement and omitting material facts from his affidavit was a personal vendetta against Speers, Fennessy admitted that, although Brown may have had a personal motive for having Speers arrested, he also had a professional motive to see that a person he suspected of involvement in criminal activity was arrested. The transcript strongly supports the trial court's conclusion that Fennessy's testimony, on which the defendants so heavily relied, was equivocal at best and that he often contradicted statements he had made earlier in the hearing and before the grand jury.⁷ On this record, we conclude that the trial court had a sufficient basis upon which to discredit Fennessy's testimony and, without credible evidence that Brown's statement was false and intentionally or recklessly made, did not err in concluding that the defendants failed to meet their burden of proof.

The defendants also alleged that Brown omitted material information from his affidavit. They claim that he failed to inform the wiretap panel (1) of the existence of a tape of a conversation in which Fennessy allegedly placed bets with Speers, (2) that Brown, as Fennessy's landlord, permitted him to live rent free, (3) of Brown's alleged personal grudge against Speers, and (4) that Brown gave Fennessy money from the city of Waterbury with which to place bets with Speers.

⁷ We specifically note the trial court's reference in its memorandum of decision to Fennessy's testimony about informing police, including Brown, of gambling activity taking place at the Mattatuck Newsstand when Fennessy was a bartender. At the suppression hearing, Fennessy claimed he had never provided the police with such information. When shown a grand jury transcript of his testimony, however, he reversed his answer and responded to a number of questions about his involvement in that situation.

"Although the court in *Franks* mentioned only 'false statements . . . included . . . in the warrant affidavit,' material omissions from such an affidavit also fall within the rule if the defendant proves that the omissions were knowingly and intentionally made, or were made with reckless disregard for the accuracy of the affidavit. *United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980)." *State v. Stepney*, 191 Conn. 233, 238, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772 (1984).

The trial court found that concern for the personal safety of the informant gave the police a legitimate reason for withholding the tape.⁸ The state has a legitimate interest in protecting informants. See *State v. Richardson*, 204 Conn. 654, 657, 529 A.2d 1236 (1987). Given the other information provided in the affidavit, and the fact that the trial court credited Kamen's testimony that Brown had decided not to submit the tape when Kamens had told him he would be risking exposing the identity of his informant, we find no error in the trial court's determination that the tape was not necessary to a finding of probable cause.

As to the claims that Brown forgave Fennessy's payment of back rent and that Brown had a personal grudge against Speers, the trial court determined that those allegations were not proved by a preponderance of the evidence. Our review of the transcript supports this holding. As the court notes, Fennessy's testimony at the hearing that Brown forgave rent payments was equivocal and contradicted his testimony before the

⁸ In addition to claiming that the omitted taped conversation was material to the affidavit, the defendants cite General Statutes § 54-41c (13) in support of their argument that the tape should have been presented to the wiretap panel with the affidavit. The defendants have done little more than cite the statutory provision. Because the issue has not been properly briefed, we decline to address the defendants' statutory claim. See *Morning Star Holding Co. v. Kostopoulos*, 12 Conn. App. 593, 595, 533 A.2d 569 (1987).

grand jury. At various times he testified that he still owed Brown rent money, that he didn't pay him because he didn't have the money, and that he had paid Brown but the check was returned for insufficient funds. The court did not find his testimony at the hearing credible.

The defendants also alleged that Brown had a personal grudge against Speers that arose when David Linsky, for whom Brown had cosigned a loan, allegedly defaulted on the loan. The defendants claimed that Linsky's default was caused by Speers' failure to pay a losing illegal bet he had placed with Linsky. Linsky's testimony at trial, which the trial court found credible, was that he had never taken a bet from Speers and that, although he may have been late on several payments, he had never defaulted on the loan. Again, we defer to the trial court's assessment of the credibility of witnesses and find no error in the court's ruling that these allegations were not proved by a preponderance of the evidence.

The trial court also found that the failure to include in the affidavit the fact that Fennessy had used city money to place bets did not materially affect the validity of the affidavit. The defendants did not present the trial court with any support for their claim that this information was material to a determination of probable cause. On our review of this claim, we conclude that the trial court did not err in determining that the defendants failed to meet their burden of proving that this omission materially affected the validity of that affidavit.

The third part of the defendants' claim of error is the assertion that the trial court erred when it determined that, regardless of the alleged false statement or omissions by Brown, the affidavit was sufficient to establish probable cause that the defendants were

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involved in illegal gambling activities. The defendants assert that the requisite elements for determining probable cause have not been met. We disagree.

Our Supreme Court has held that the standard for determining probable cause as set out in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), applies to cases involving the sufficiency of affidavits for wiretap investigations. See *State v. Telesca*, 199 Conn. 591, 601, 508 A.2d 1367 (1986);⁹ *State v. Ross*, 194 Conn. 447, 463, 481 A.2d 730 (1984). Under the *Aguilar-Spinelli* standard, "the wiretap panel that issues the wiretap order must be 'informed of (1) some of the underlying circumstances relied on by the person providing the information to the affiant; and (2) some of the underlying circumstances from which the affiant concluded (a) that the informant, whose identity need not even be disclosed, was credible, or (b) that his information was reliable.'" *State v. Delmonaco*, 194 Conn. 331, 338, 481 A.2d 40, cert. denied, 469 U.S. 1036, 105 S. Ct. 511, 83 L. Ed. 2d 401 (1984) . . . *State v. Jackson*, 162 Conn. 440, 446, 294 A.2d 517, cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 121 (1972)." (Citations omitted.) *State v. Telesca*, supra, 601-602.

We conclude that the trial court properly held that the Brown affidavit contained information sufficient to satisfy the first or "basis of knowledge" element of the *Aguilar-Spinelli* standard. The affidavit declares that Fennessy had been placing bets with the defendant Speers for at least two or three months, using one

⁹ In *State v. Telesca*, 199 Conn. 591, 601 n.7, 508 A.2d 1367 (1986), the court noted that the statute listing the requirements of a proper wiretap application, now General Statutes § 54-41c, "incorporates the standards enunciated in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)."

of Speers' telephone numbers. The affidavit contains detailed information, including telephone numbers used and specific times and dates related to sports wagering, and identifies college basketball teams on which the informant placed bets with the defendants. This information satisfied the requirement that the affidavit "relate sufficient facts from which a judge reasonably could conclude that the informants based their allegations of criminal activity on sufficient underlying circumstances." *State v. Delmonaco*, supra, 339.

We also conclude that the trial court properly determined that the second or "reliability" element of the standard was met, because sufficient evidence of the circumstances from which Brown concluded that Fennessy was a credible informant, or that his information was reliable, was presented to the wiretap panel. The second part of the *Aguilar-Spinelli* standard is satisfied if the affidavit includes sufficient evidence showing either why the affiant concluded the informant was credible, or that the information was reliable. An affiant is not required, however, to convince a wiretap panel of an informant's credibility by a display of unequivocal proof based on specific details. "An affiant need not recite the precise factors on which he judged his informant credible and reliable. *Aguilar v. Texas* . . . requires only that the magistrate be informed of some of these underlying circumstances. If they are apparent to the commonsense reader of the affidavit—whether by necessary implication or recital—it is enough." *State v. Jackson*, supra, 452-53. We note that, on the basis of the information provided by the affiants, the three judge wiretap panel unanimously decided to issue the wiretap order and concluded that the application met the requirements of General Statutes § 54-41c.¹⁰ The trial court proceeded

¹⁰ General Statutes § 54-41c provides: "Each application for an order authorizing the interception of a wire communication shall be made in writ-

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from a presumption that the affidavits supporting the search warrant were valid; *State v. Dolphin*, supra, 457; restricted its review to the record before the wiretap

ing upon oath or affirmation to a panel of judges. Each application shall include the following information: (1) The identity of the applicant and his authority to make such application; (2) the identity and qualifications of the investigative officers or agency for whom the authority to intercept a wire communication is sought; (3) the identity and qualifications of the investigative or law enforcement officers to whom disclosure of the contents of any intercepted wire communication or evidence derived therefrom might be made; (4) a statement of the use to which the contents of any intercepted wire communication or any evidence derived therefrom will be put; (5) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his reasonable belief that the wire communication of a particularly described person will constitute evidence of a crime enumerated in section 54-41b that has been or is being committed or that such communication will materially aid in the apprehension of the perpetrator of such crime and that an order should be issued, including (A) details as to the particular offense that has been or is being committed, (B) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (C) a particular description of the type of communications sought to be intercepted, (D) the identity of the person, if known, who has committed or is committing the offense and whose communications are to be intercepted, (E) the time and date when the facts and circumstances relied upon by the applicant were first received by him or by the investigative or law enforcement officer conducting the investigation, whichever is earlier, (F) the way in which the intercepted wire communication will constitute material evidence of the particularly described offense or will materially aid in the apprehension of the perpetrator of such offense, (G) the hours of the day or night during which wire communication may be reasonably expected to occur; (6) a full and complete statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ; (7) a statement of the period of time for which the interception is required to be maintained. No order authorizing or approving the interception of a wire communication shall be issued if the facts and circumstances relied upon by the applicant were discovered more than twenty days next preceding the date of the application. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; (8) a full and complete statement of the facts concerning all previous applications known to the individual making the application, made to any panel of judges, for authorization to intercept, or for approval of inter-

panel; *State v. Ross*, 194 Conn. 447, 459, 481 A.2d 730 (1984); and accorded deference to the decision made by the wiretap panel. *Id.*; *State v. Couture*, 194 Conn.

ceptions of, wire communications involving any of the same persons, facilities or places specified in the application, and the action taken by the panel on each such application; (9) a statement that the wire communications sought are material to a particularly described investigation or prosecution and that such communications are not legally privileged; (10) if it is reasonably necessary to make a secret entry upon a private place or premises in order to install an intercepting device to effectuate the interception, a statement to that effect and to the effect that no practicable alternative method of executing the order which will preserve the secrecy of its execution exists; (11) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results, (12) where the application is for an order authorizing interception in excess of thirty-five orders previously issued by all panels in a calendar year, a statement setting forth the nature of the emergency situation which may result in imminent peril to the public health, safety or welfare, and the nature of that imminent peril, which requires the issuance of an additional interception order. The state's attorney shall inform the governor and the joint standing committee of the general assembly having cognizance of matters relating to criminal law and procedure of the nature of the emergency situation which may result in imminent peril to the public health, safety or welfare, and the nature of that imminent peril; (13) such additional testimony or documentary evidence in support of fact in the application as the panel of judges may require. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts establishing such probable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief shall be either disclosed or described, and the application shall contain facts establishing the existence and reliability of the informant, or the reliability of the information supplied by him. The application shall also state the basis of the informant's knowledge or belief. If the applicant's information and belief are derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof shall be annexed to or included in the application. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant, or information and belief with the source thereof and reason therefor specified."

530, 536, 482 A.2d 300 (1984), cert. denied, 469 U.S. 1192, 105 S. Ct. 967, 83 L. Ed. 971 (1985).

After excising Brown's allegedly false statement that the informant's past information had led to two arrests and convictions, the trial court found that Brown's remaining affidavit statements—(1) that he had known Fennessy for about four years; (2) that Fennessy had no arrest record; and (3) that Fennessy was gainfully employed and enjoyed a good reputation within the community in which he lived—were sufficient indicia of reliability upon which the wiretap panel could find the affidavit established that the informant was credible. The court also determined that Fennessy's information was reliable on the basis of statements in the affidavit that Fennessy had provided Brown with information in the past that had proved both truthful and accurate, that Fennessy was knowledgeable in the area of sports betting, and that Fennessy himself had engaged in illegal gambling with the defendants.

Given some of the events that occurred following Speers' arrest such as the labeling of Fennessy as an informant, Fennessy's admission of having felt intimidated by Speers' driving him to a meeting with state police officers at which he was questioned about the information he had given Brown about Speers, and Fennessy's arrest by the state police, we do not find it implausible that the trial court would discredit Fennessy's testimony for the purpose of deciding whether Brown's statement was false and intentionally or recklessly made, on one hand, and, on the other, find that the wiretap panel had sufficient indicia of reliability to credit Brown's statement that Fennessy was, in Brown's estimation, a reliable informant. We conclude that the trial court was correct in determining that, even absent the allegedly false statements in the affidavit, there was sufficient information to provide a basis for the wiretap panel to determine that the affi-

davits satisfied the second element of *Aguilar-Spinelli* and the requirements of General Statutes § 54-41c, and to approve the wiretap application.

II

The defendants also claim that the trial court erred in failing to take judicial notice of Brown's perjury case court file after Brown refused to testify. This argument is without merit.

During the suppression hearing, the defendants sought to introduce the entire case file pertaining to Brown's perjury arrest. In addition to general information concerning Brown's arrest, this file contained the transcripts of Brown's testimony before the grand jury and a lengthy affidavit by Inspector Frank D'Amico of the chief state's attorney's office that was used to establish probable cause to arrest Brown and contained references to the grand jury testimony of others. The prosecution objected to the admission of the file, arguing that it contained hearsay and included conclusory and irrelevant information. The court sustained the objection, but stated that because Brown was not available it would allow the introduction of the transcript of his testimony before the grand jury. The defendants declined the court's offer and again requested that the entire case file be introduced. The court refused, and the defendants withdrew their request. The defendants have not provided any legal authority supporting the admission of the file but argue only that the court should have admitted it because of the unique situation in which the defendants found themselves after Brown refused to testify.

A court has the power to take judicial notice of a file in another pending court case. *State v. Bunkley*, 202 Conn. 629, 648, 572 A.2d 795 (1987). A trial court, however, also has broad discretion in determining the admissibility of evidence. *Id.*, 648-49. Trial court rul-

ings on evidence are accorded great deference on appeal, and such rulings will be disturbed only upon a showing of clear abuse of discretion. *State v. Boucino*, 199 Conn. 207, 225, 506 A.2d 125 (1986). Our review of the record leads us to conclude that the trial court did not err in refusing to admit the entire case file because it contained inadmissible hearsay and double hearsay.

III

The defendant also argues, for the first time on appeal, that his inability to cross-examine his chief accuser, Brown, violated his sixth amendment right of confrontation and should have mandated a dismissal of all charges. Because the defendants failed to raise the argument below and do not seek review under *State v. Evans*, 165 Conn. 61, 327 A.2d 576 (1973), or claim that the ruling constituted plain error reviewable under Practice Book § 4185, we decline to review the claim. See *State v. Maisonet*, 16 Conn. App. 89, 546 A.2d 951 (1988).

There is no error.

In this opinion the other judges concurred.

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-88-1169

State of Connecticut

v.

Thomas Speers

**ORDER ON PETITION FOR
CERTIFICATION TO APPEAL**

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (17 Conn. App. 587) it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

/s/ Alan M. Gannuscio

Assistant Clerk — Appellate

Dated: May 18, 1989

Notice to: May 18, 1989
Clerk, Superior Court, Waterbury,
#CR4-117660, CR4117663
Clerk, Appellate Court
Frederick D. Paoletti
Timothy Moynahan
John Connelly, S.A.
Carmody & Torrance

Frederick D. Paoletti in support of petition — *John A. Connelly*, State's Attorney and *Joan K. Alexander*, Assistant State's Attorney, in opposition

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONNECTICUT GENERAL STATUTES

Sec. 54-41b. Application for order authorizing interception. The chief state's attorney or the state's attorney for the judicial district in which the interception is to be conducted may make application to a panel of judges for an order authorizing the interception of any wire communication by investigative officers having responsibility for the investigation of offenses as to which the application is made when such interception may provide evidence of the commission of offenses involving gambling, bribery, violations of section 53-395, violations of section 21a-277 or felonious crimes of violence.

Sec. 54-41c. Information in application. Each application for an order authorizing the interception of a wire communication shall be made in writing upon oath or affirmation to a panel of judges. Each application shall include the following information: (1) The identity of the applicant and his authority to make such application; (2) the identity and qualifications of the investigative officers or agency for whom the authority to intercept a wire communication is sought; (3) the identity and qualifications of the investigative or law enforcement officers to whom disclosure of the contents of an intercepted wire communication or evidence derived therefrom might be made; (4) a statement of the use to which the contents of any intercepted wire communication or any evidence derived therefrom will be put; (5) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his reasonable belief that the wire communication of a particularly described person will constitute evidence of a crime enumerated in section 54-41b that has been or is being committed or that such communication will materially aid in the apprehension of the perpetrator of such crime and that an order should be issued, including (A) details as to the particular offense that has been

or is being committed, (B) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (C) a particular description of the type of communications sought to be intercepted, (D) the identity of the person, if known, who has committed or is committing the offense and whose communications are to be intercepted, (E) the time and date when the facts and circumstances relied upon by the applicant were first received by him or by the investigative or law enforcement officer conducting the investigation, whichever is earlier, (F) the way in which the intercepted wire communication will constitute material evidence of the particularly described offense or will materially aid in the apprehension of the perpetrator of such offense, (G) the hours of the day or night during which wire communication may be reasonably expected to occur; (6) a full and complete statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ; (7) a statement of the period of time for which the interception is required to be maintained. No order authorizing or approving the interception of a wire communication shall be issued if the facts and circumstances relied upon by the applicant were discovered more than twenty days next preceding the date of the application. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; (8) a full and complete statement of the facts concerning all previous applications known to the individual making the application, made to any panel of judges, for authorization to intercept, or for approval of interceptions of, wire communications involving any of the same persons, facilities or places specified in the application, and the action taken by the panel on each such application; (9) a statement that the wire communications sought are material to a particularly described investigation or prosecution and that such

communications are not legally privileged; (10) if it is reasonably necessary to make a secret entry upon a private place or premises in order to install an intercepting device to effectuate the interception, a statement to that effect and to the effect that no practicable alternative method of executing the order which will preserve the secrecy of its execution exists; (11) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results; (12) where the application is for an order authorizing interception in excess of thirty-five orders previously issued by all panels in a calendar year, a statement setting forth the nature of the emergency situation which may result in imminent peril to the public health, safety or welfare, and the nature of that imminent peril, which requires the issuance of an additional interception order. The state's attorney shall inform the governor and the joint standing committee of the general assembly having cognizance of matters relating to criminal law and procedure of the nature of the emergency situation which may result in imminent peril to the public health, safety or welfare, and the nature of that imminent peril; (13) such additional testimony or documentary evidence in support of fact in the application as the panel of judges may require. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts establishing such probable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief shall be either disclosed or described, and the application shall contain facts establishing the existence and reliability of the informant, or the reliability of the information supplied by him. The application shall also state the basis of the informant's knowledge or belief. If the applicant's information and belief are derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof shall be annexed to or included in the application. Affidavits of persons other than the applicant may be submitted in

conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant, or information and belief with the source thereof and reason therefor specified.

Sec. 54-41m. Motion to suppress. Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the state of Connecticut, or of a political subdivision thereof, may move to suppress the contents of any intercepted wire communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted under the provisions of this chapter; the order of authorization or approval under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval. Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion, in which case such motion may be made at any time during the course of such trial, hearing or proceeding. If the motion is granted, the contents of the intercepted wire communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter and shall not be received in evidence in any such trial, hearing or proceeding. The panel, upon the filing of such motion by the aggrieved person, shall make available to the aggrieved person or his counsel for inspection the intercepted communication and evidence derived therefrom.

Sec. 53-278a. Gambling: Definitions. As used in sections 53-278a to 53-278g, inclusive:

(1) "Gain" means the direct realization of winnings; "profit" means any other realized or unrealized benefit, direct or indirect, including without limitation benefits from proprietorship, management or unequal advantage in a series of transactions;

(2) "Gambling" means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance or the operation of a gambling device, but does not include: Legal contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entries; legal business transactions which are valid under the law of contracts; activity legal under the provisions of sections 7-169 to 7-186l, inclusive; any lottery or contest conducted by or under the authority of any state of the United States, commonwealth of Puerto Rico or any possession or territory of the United States; and other acts or transactions expressly authorized by law on or after October 1, 1973;

(3) "Professional gambling" means accepting or offering to accept, for profit, money, credits, deposits or other things of value risked in gambling, or any claim thereon or interest therein. Without limiting the generality of this definition, the following shall be included: Pool-selling and bookmaking; maintaining slot machines, one-ball machines or variants thereof, pinball machines, which award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars or spindles, in any place accessible to the public; and except as provided in sections 7-169 to 7-186m, conducting lotteries, gift enterprises, disposal or sale of property by lottery or hazard or policy or numbers games, or selling chances therein; and the following shall be presumed to be included: Conducting any banking game played with cards, dice or counters, or accepting any fixed share of the stakes therein;

(4) "Gambling device" means any device or mechanism by the operation of which a right to money, credits, deposits or other things of value may be created, as the result of the operation of an element of chance; any device or mechanism which, when operated for a consideration, does not return the same value or thing of value for the same consideration upon each operation thereof; any device, mechanism, furniture or

fixture designed primarily for use in connection with professional gambling; and any subassembly or essential part designed or intended for use in connection with any such device, mechanism, furniture, fixture, construction or installation, provided an immediate and unrecorded right of replay mechanically conferred on players of pinball machines and similar amusement devices shall be presumed to be without value;

(5) "Gambling record" means any record, receipt, ticket, certificate, token, slip or notation given, made, used or intended to be used in connection with professional gambling;

(6) "Gambling information" means a communication with respect to any wager made in the course of, and any information intended to be used for, professional gambling. Information as to wagers, betting odds or changes in betting odds shall be presumed to be intended for use in professional gambling;

(7) "Gambling premise" means any building, room, enclosure, vehicle, vessel or other place, whether open or enclosed, used or intended to be used for professional gambling. Any place where a gambling device is found shall be presumed to be intended to be used for professional gambling, except a place wherein a bazaar or raffle for which a permit has been issued under sections 7-170 to 7-186, inclusive, or bingo for which a permit has been issued under section 7-169 or games of chance for which a permit has been issued under sections 7-186a to 7-186m, inclusive, is to be conducted;

(8) "Person" includes natural persons, partnerships and associations of persons and corporations; and any corporate officer, director or stockholder who authorizes, participates in or knowingly accepts benefits from any violation of sections 53-278a to 53-278g, inclusive, committed by his corporation;

(9) "Peace officer" means a municipal or state police officer, sheriff, deputy sheriff or chief inspector or inspector in the division of criminal justice;

(10) "Court" means the superior court.

Sec. 53-278b. Gambling; professional gambling; penalties. (a) Any person who engages in gambling, or solicits or induces another to engage in gambling, or is present when another person or persons are engaged in gambling, shall be guilty of a class B misdemeanor; provided natural persons shall be exempt from prosecution and punishment under this subsection for any game, wager or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only and in which no person is participating, directly or indirectly, in professional gambling.

(b) Any person who engages in professional gambling shall be guilty of a class A misdemeanor.

Sec. 53-278f. Persistent offenders. Any person who has been convicted of a violation of subsection (b) of section 53-278b, subsection (d) of section 53-278c, subsection (a) of section 53-278d, or subsection (d) of section 53-278e or any statute predecessor thereto may, upon any subsequent violation of said subsections, be prosecuted as a persistent offender and on conviction may be subjected to the penalty of the next most serious classification of offense, provided it shall be an affirmative defense to the charge of being a persistent offender under this section if the defendant was pardoned on the ground of innocence with respect to the prior conviction on which the state is relying.